United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1921

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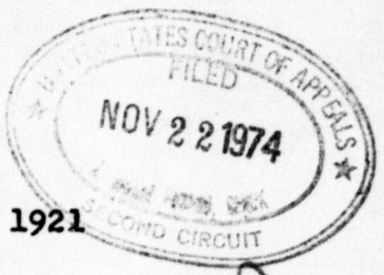
NOV 22 1974



STANLEY V. TUCKER,
Plaintiff-Appellant

T-3642

-vs-

No 74- 1921

JEAN NEAL, ROBERT R. ANDERSON,
and ANDERSON & ANDERSON, etc.
Defendants -Appellees

.....

APPELLANT's REPLY BRIEF

.....

Appeal From Final Judgment Entered on Cross-Motions For Summary Judgment on May 29th, 1974 (Ruling dated March 5th, 1974) and

Appeal From Final Order or Judgment Made June 11, 1974 Denying Motion For New Trial and Motion To vacate Judgment

.....

HONORABLE T. EMMET CLARIE
TRIAL JUDGE

STANLEY V. TUCKER
APPELLANT/PLAINTIFF
Box 35
Hartford, Conn 06101

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY NOTE

Appellant filed by mail and served his BRIEF and APPENDIX on August 30th, 1974. Subsequently Appellees filed a Motion to Dismiss the Appeal and On September 30th, 1974 prior to hearing on said Motion filed the BRIEF FOR APPELLEES. The Motion To Dismiss the appeal was based on alleged omissions in the Appendix.

This Honorable Court on October 1, 1974 denied the Motion to Dismiss conditional on filing of Supplemental Appendix including such matter as Appellees would designate. On October 22, 1974 Appellant filed by mail and served the APPELLANT'S SUPPLEMENTAL APPENDIX. Three times Appellant has corresponded with Appellees counsel, Robert R. Anderson, offering to stipulate to filing Briefs out of time in the event Appellees desired further briefing and as of this date no response having been received it is deemed that the Appellees stand on their Brief and Appellant replies below.

INTRODUCTION TO REPLY BRIEF

In plain and simple language Appellees seek to collect a judgment debt by use of long arm process justified by esoteric argment regarding a "tort" and "activities" all of which Appellant developed in his Brief are federally protected. The tort basis expired on a statute of limitations counted from 1965. Fundamental upon comparison of the two briefs Appellant contends the following arguments are not responded to or avoided in the Appellee's Brief:

UNCONTROVERTED ARGUMENT IN APPELLANT'S BRIEF

1. Fraud by Appellees in the California Federal Court in the concealment of their jurisdictional basis in an ex-parte affidavit and brief precludes Res Judicata.

The counter-argument pages 13-14 makes use of superlatives and fails to list a single case to show that use of fraud does not prevent Res Judicata. Indeed Appellees are most careful to avoid mention of fraud in their argument.

2. California judgment is void due to lack of service by U. S. Marshall. FRCP 4 c.

Appellees carefully avoid the cases studiously cited by Appellant such as Veek v Commodity Enterprises 487 F 2d 423. USA For the Use of Tanos v St Paul 361 F 2d 838. Instead Appellees fall on outdated inferences and "interpretations" in Professor Moore's "2 Moore's Federal Practice." Much of Moore's work is subject to the limitation that Professor has expounded "interpretations" based on certain cases favored by Professor Moore. Many later courts have rejected expressly many of Moore's interpretations and as of 1974 Moore's does not accurately reflect the law in many respects where higher court decisions have developed contrary to Moores Federal Practice. Veek is such a case.

I. THE CONN. DISTRICT COURT HAS PREVIOUSLY REJECTED JURISDICTION OBTAINED BY TRICKERY OR FRAUD

In his Opening Brief this Appellant developed how by use of fraud, trickery, surprise and deceipt the Appellees concealed a multi-page jurisdictional statement in an ex-parte application for out of state issuance of summons and then in a barren skimpy one page complaint filed in the district court of California failed to cite any jurisdictional statment at all as required by FRCP Rule 8 a.

A case arising from the District Court of Connecticut made clear that fraud or deceit used in obtaining jurisdiction was grounds for dismissing a complaint and accordingly the California complaint should have been dismiseed.
See: Commercial Air Charters v Sundorph Aeronautical Corp
57Fed Rules Decisions 84

At P 88:

> "The law on this subject is familiar, though happily not often invoked. A party found within the jurisdiction may, of course, be there served; 'but it cannot be said that he was so found there, if he was inveigled or enticed into the district for the purpose of making . . . service upon him, by false representations and deceitful contrivances of the plaintiff in the suit, or by any one acting in his behalf.'" *Id.* at 702.

Sirco v American Express 99 Conn 95, 121 A 280 is quoted with approval in Commercial Air Charters at P 86

> The Court in Siro v. American Express Co., *supra*, unequivocally distinguished the facts before it from those instances in which a defendant had been lured into the jurisdiction. It stated
>
> "It is the law of this state that in a civil case the court will not exercise a jurisdiction which rests upon a service of process on a defendant who has been decoyed, enticed, or induced to come within its reach by any false representation, deceitful contrivance, or wrongful device for which the plaintiff is responsible." *Id.*, 99 Conn. at 99, 121 A. at 281.

II A. NEW YORK DISTRICT COURTS HAVE REJECTED SERVICE IMPROPERLY CARRIED OUT BY PLAINTIFF'S JUST AS ATTORNEY ADDERSON IMPROPERLY CARRIED OUT SERVICE IN CALIFORNIA.

Robert R. Anderson, attorney in California for Appellees, makes most clear that he made service without benefit of any court order. (See Appendix E 11) Also see Point I of Appellant's Brief.

This "self-serving" self-service has been considered in White v Secretary of Health, Education & Welfare 56 F R D 497, Aug 9, 1972 USDC ND NY.

See at Page 499:

> Federal Rule of Civil Procedure 3 provides that a civil action is commenced by filing a complaint with the court; Rule 4(a) further provides that upon the filing of the complaint the clerk shall issue a summons and deliver it for service to the Marshal or to a person specially appointed to serve it and Rule 4(c) provides that service of all process shall be made by a United States Marshal, by his deputy or by some person specially appointed by the court for that purpose. There was, therefore, no authority allowing plaintiff to attempt service as he describes.

II B. NEVADA DISTRICT COURT REJECTED UNDER MANDATORY RULES APPLICABLE HEREIN TO PERMITTING ANY PERSON OTHER THAN U. S. MARSHALL TO SERVE WRITS OF EXECUTION, ATTACHMENT AND GARNISHMENT

A major contention by this Appellant on appeal is that Attorney Anderson using his own brand of "self-help" recorded a series of jurdment liens in Connecticut that this Appellant seeks to have the Court declare invalid and void. The statutory grounds for voiding these liens are set forth on Page 26 of Appellant's Brief namely violation of FRCP Rules 4 c, 64 and 69.

This precise point was explored on a factual situation on "all fours" with this action and Appellant's argment herein was sustained by the District Court of Nevada and indeed the Nevada court brought out relevant argment to solidify the argument that only the federal marshall must serve liens.

Chemical Bank NY Trust Co v Pug Sand & Gravel Corp
51 FRD 147 D Nevada 1970

The Nevada court refused a litigant who had "registered" a federal judgment in Nevada (just as Anderson pretends to have "registered" a California judgment in Connecticut) an order permitting a county sheriff to serve the lien upon grounds as follows:

at Page 147:

Proceeding on motion of judgment creditor for designation of county sheriff to serve process. The District Court, Thompson, J., held that judgment creditor who had registered judgment with clerk of District Court was not entitled under rule relating to persons entitled to serve all process to designation of a person other than United States marshal to make service and levies of writs of execution, attachment and garnishment, and term "all process" as used in rule was not intended to encompass writs authorizing or requiring property to be seized and taken into custodia legis.

Motion denied.

at Page 148:

... While process which functions only as notice to a litigant or third party, the obligations of the process server being completed when service is made, may appropriately be accomplished by any qualified person under court authorization, this is not so with respect to process which invokes other duties and responsibilities subject to court supervision and governed by federal statutes. The statutory requirements for bonding a United States Marshal and his deputies (28 U.S.C. § 564), and statutory requirements regarding collection and accounting for fees (28 U.S.C. § 572), the charges for levying upon and keeping seized properties (28 U.S.C. § 1921), and the obligations with respect to judicial sales (28 U.S.C. § 2001, et seq.), for examples, are inapplicable to a person whose sole official connection with court administration is a designation under Rule 4(c) as a person qualified and authorized to make service.

The Chemical Bank court went on to show the consistentcy with UNited States for Use of Tanos v St Paul Mercury Insr. Co, a case briefed and relied on by Appellant in his Brief.

Of greatest importance is the strong language in the Chemical Bank case to the effect that NO PERSON OTHER THAN THE U. S. MARSHALL should ever be appointed by a court to serve attachment, liens, garnishments, etc.. Thus this case (Chemical Bank) went further than this Appellant in his argument on this appeal.

The Chemical Bank Court showed much merit in its opinion in that statutory bonding (28 USC 564) and statutory requirments regarding collection and the accountinf for fees (28 USC 572), the charging for levying upon and keeping seized properties (28 USC 1921) and obligations with respect to judicial sales (28 USC 2001, et seq) are inapplicable to a person in a designation by court order under Rule 4 c.

Thus under this reasoning Anderson even if he had applied for an order permitting him to levy the judgment liens SHOULD HAVE BEEN DENIED SUCH ORDER.

III. SUMMARY JUDGMENT IMPROPERLY GRANTED ON ATTORNEY ANDERSON'S HEARSAY AFFIDAVIT

In support of summary judgment RULE 56(e)FRCP requires that....."affidavits shall be made on personal knowledge shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Attorney Anderson's three page affidavit (J4 - J7 of Supplemental Ampendix) does not meet this stern test.

On page J4 of the affidavit Anderson eight times alleges that....." I have seen him.....". This sole allegation is made and is irrelevant to the issues briefed on this appeal, namely fraud as to jurisdictional issue in California court, lack of activity, failure to have marshall serve summons, etc., etc.,.

On page J5 of the affidavit Anderson explores with grandest use of hearsay activities going back to 1965 (the alleged tort basis) whereas by his own admissions he first came into the picture about 1966 or thereabouts Anderson fails to show even his "hearsay source" - can it be one of the Clerks of the state courts ? - can it be one of his clients. It does not matter. Hearsay is Hearsay and inadequate to support summary judgment.

On page J6 Anderson alleges the sequence of events that took place in the California federal court. We might guess that Anderson might have been present at some stage of the proceedings but he does not so allege. Once again we guess at Andersons's "hearsay source" - obviously a clerk of the court, or his former law partner, or clients.

The appellant's brief Pages 24 - 26 explores federal cases rejecting an attorney's hearsay affidavit. See Welcher v U. S. 14 FRD at 239

A rcently reported California appellate case (see Appellate Report - L. A. Daily Journal October 29, 1974) Dugar v Records and Records v Ampex , 2nd CA 42790.

P 51: "thus we conclude that the documentation relied upon by the trial court in granting the motion for summary judgment was incompetent evidence. Accordingly, we reverse the motion for summary judgment."

In Dugar, supra, an affidavit with deficiencies by on Officer of the corporation was filed. The affidavit was attempted to be improved by the attorney's own affidavit and this too was inadequate.

IV. THE TEXAS DISTRICT COURT VACATED DEFAULT JUDGMENT FOR FAILURE TO COMPLY WITH STATUTORY CONDITIONS SIMILAR TO THOSE VIOLATED BY APPELLEES.

See: Henderson 66 Sales, Inc et al v Harvison et Al

58 FRD 408 1973 N.D. Texas

In Henderson, supra, substitued service was made on a Texas resident under a statute so providing "only if after diligent effort personal service could not be made". Default judgment was rendered and an appeal taken. The default judgment was set aside on grounds that the record showed personal service could have been made. This vindicates Appellant's position herein that Anderson's judgment should be declared void for failure to comply with statutory conditions on service of process, namely by Federal Marshall. Rule 4c.

Another point of great interest to this appeal coming from Henderson, supra, is the position taken that ex parte proceedings (such as Andersons ex parte application in California for issuance of out of state summons) should be set aside on justification in favor of a "trial on the merits" See P 412:

Henderson 66 Sales, v Harvison
58 FRD 408

[4-6] While "a party should not be permitted to flout [the rules] with impunity,"[4] and a default judgment should only be set aside upon a showing that there "was good reason for the default,"[5] it is clear that any doubts should be resolved in favor of a trial on the merits.[6] This Court is not of the opinion that evidence adduced at an ex parte hearing which forms the foundation for a default judgment, even though of a probative nature and introduced in good faith, should preclude later scrutiny in an effort to determine whether, in hindsight, diligence has been exercised and all appropriate measures have been taken to effect personal service. In this regard the Court wants to make clear its belief that if by virtue of the actions of a defendant in a lawsuit it appears that it is impractical to effect personal service, the fact that, in reality, personal service could have been obtained may not entitle a party in default to have a judgment set aside. The evidence in this cause of action is not such as to support a finding that the actions of defendant Alkek and/or his business associates were so designed.

V. APPELLEES RELY ON INFERENCES IN MOORES FEDERAL PRACTICE SERIES THAT HAVE BEEN VOIDED BY LATER FEDERAL DECISIONS

Federal Courts have frequently rejected argument appearing in Professor Moores Federal Practice volumes as contrary to the latest cases or contrary to studied interpretations of federal statutes.

Yet Appellees rely exclusivly on 2 Moores Federal Practice Section 4:08 (see P 25 Appellees Brief), for the defense of Appellant's claim that the California judgment is void because not served by Federal Marshall (summons) nor by a person especially appointed by the Court. Rule 4 c FRCP.

The specific language imports in Moores, supra, that in cases of substituted service (such as on secretary of state) or publication (newspapers) the Marshall may not be needed. The language is more than vague as to the requirement of a court order for service by a third party. The content of S 4:08 2 Moore's Federal Practice comes from the 1st edition (1938) and carried along in the 2nd edition (1948) although attempts can be seen to correlate earlier case law with changed resulting from adoption of the 1948 Judicial Code.

Unfortunately the approach taken by Professor Moore in his detailed attempt to describe the historical evolution of the federal rules of civil procedure refers to case law of a specific period and constantly mixes "bad" (outmoded) law with "good" (current) law.

A classic example appears on P 1010 Section 4:08"

"Ideally Rule 4 c should have been amended"

This classic understatment is underscored again and again in reading contradictory material in cases that arose years ago under federal rules long since revised.

This unfortunate aspect of Moores, supra, relied upon exclusively by Appellees as their sole defense to the claimed violation of Rule 4 c is that "inferences" or "interpretation" or "deductions" made years ago by Professor Moore are no longer supported by latest case law. A steady line of federal cases from district courts and from courts of appeal hold clearly that the Marshall or a person specially appointed by the Court MUST MAKE SERVICE AND NO ONE ELSE OR THERE IS NO JURISDICTION. This federal statutory requirement is crystal clear from both statutes (Rule 4c) and latest cases.

In fact the 1973 Supplement to 2 Moores Federal Practice makes note on P 59 to expanding federal case law.

P 59 "U. S for use of Tanes v St Paul Ins. Co "
C A 5th 1966
361 F 2d 838

Appellant's brief refers to latest authority:

Pages 6-8: Veek v Commodity Enterprises
487 F 2d 423
9th C. A. Nov 6th, 1973

Page 27 Rumsey v Failing
333 F 2d 960
10th C. A. 1964

Within the physical frontiers of the 2nd C. A. the following cases are relevant and settle the point of invalidity of service not made by federal marshall nor by someone appointed by order of the court.

An early case settling this point arising from the District Court E. D. NY is:

In Re Miller
40 F Supp 464
Aug 8th, 1951

In In Re Miller service of summons and complaint was made in part by mail by the federal marshall. An amended complaint and summons was served by the marshall. Various motions and papers and amended complaint were then served by agents of plaintiffs.

See P 467: "Although the plaintiffs filed prooofs of service of various matters by their agents, insofar as obtaining jurisdiction of the defendants is concerned, these services were invalid, because the plaintiffs neither applied for nor received authority to have service of process made by a person other than the United States Marshall. Rule 4 (c)."

See P 468: "Now, September 13, 1941, it is ordered that the complaint and the amended complaint in the above entitled case, be and are hereby dismissed"

Thus this early (1941) case from the New York federal court fully disposes of Appellee's only claimed defense.
A latter case in the 2nd C. A. held that due process was not offended by a proper service by the federal marshall using registered mails. See:

Farr v CIA International
343 F 2d 342
April 23, 1957

The very latest case that squarely and fully disposes of Appellee's defense to claimed violation of Rule 4 c is:
Sapphia v Lauro Lines 130 F Supp 810 S. D. NY 1955

Sapphia supra at Page 810:

> Action for injuries sustained while aboard ship on high seas. On motion of operator of ship to vacate service of process attempted to be made on him by delivering copy of summons and complaint to his agent for sale of passage tickets for the ship, the District Court, Sugarman, J., held that where plaintiffs failed to prove that operator's ticket agent was in fact authorized by appointment or by law to receive service of process, and where there was no showing or even contention that plaintiffs' counsel, who attempted service under New York practice, was specially appointed to make that service, as required by Federal Rules, plaintiffs attempted service was abortive.
>
> Motion granted.

CONCLUSION

This Reply Brief reflects answers to argument in the Appellee's Brief and the cases cited, including Sapphio, supra, from the District Courts of New York, are part of a long series of cases briefed that hold the California judgment and the liens recorded in Connecticut are void as as without jurisdiction, due to failure to comply with Rule 4 c , FRCP.

The judgment below should be reversed and the liens and California judgment declared void and ordered released.

Respectfully Submitted:

By_____

STANLEY V. TUCKER

CERTIFICATE OF SERVICE BY MAIL

I, STANLEY V, TUCKER, hereby certify that on the 21st day of November 1974 I served the document annexed, APPELLANT's REPLY BRIEF on the Appellees herein by mailing 2 true copy thereof postage prepaid air mail by depositing in the United States mails at Hartford Conn addressed as follows:

JEAN NEAL

621 E. Main St
Santa Paula, Calif

ROBERT R. ANDERSON
ANDERSON & ANDERSON
621 E. Main St
Santa Paula, Calif.

By_____
STANLEY V. TUCKER